

GIFFORD PINCHOT TASK FORCE

NEPA Task Force
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RE: Comments on the Proposed Nature and Scope of NEPA Task Force Activities

To Whom It May Concern:

August 22nd, 2002

The mission of the Gifford Pinchot Task Force (GPTF) is to act as an advocate for the ecosystems and communities of Southwest Washington with particular focus on the Gifford Pinchot National Forest. We promote an increasing ecologically sustainable use of public forests, with recognition of all ecologically important benefits derived by local economies from non-consumptive uses. The Task Force serves as an informational and educational resource on forest ecosystems of southwest Washington for interested citizens and organizations through a variety of avenues including our using federal environmental laws and citizen involvement as tools for preserving and restoring biodiversity in the Pacific Northwest.

The mission of the Northwest Environmental Defense Center (NEDC) is to preserve and protect the biological diversity of the Pacific Northwest. Recognizing the rapid loss of biological diversity as a threat to all life, League of Wilderness Defenders (LOWD) members work around Oregon to protect and restore wilderness habitat. LOWD and its members actively participate in governmental decision-making processes on public lands, including national forests, throughout Oregon. Blue Mountains Biodiversity Project (BMBP) was established by LOWD to further LOWD's goals throughout the Blue Mountains. The mission of BMBP is to protect and restore the biodiversity of the Blue Mountains region of Oregon and Washington and to educate the public about threats to forest ecosystems in eastern Oregon. In order to further its mission and protect the interests of LOWD's members in preserving the biodiversity of the Pacific Northwest forests, BMBP monitors timber sales and other Forest Service activities on the Malheur, Umatilla, Deschutes, and Ochoco National Forests.

Our organizations have thousands of members across the United States who use public lands for a variety of purposes including recreation, hiking, photography, scientific research, spiritual renewal, and education. GPTF, NEDC, and BMBP have made significant use of the National Environmental Policy Act (NEPA), and we believe that NEPA contributes greatly to public and agency understanding in decisions affecting public land management. We remain committed to NEPA's integrity, and appreciate the opportunity to share our thoughts on the Council's proposal.

These comments will respond to the questions posed in the July 9th 2002 Federal Register notice at 67 Fed.Reg. 45,510. Because the bulk of our experience is with Forest Service and Bureau of Land Management (BLM) proposals on federal land, we will respond to the proffered questions with this experience in mind.

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A. Technology, Information Management, and Information Security.

- 1. Where do you find data and background studies to either prepare NEPA analyses or to provide input or to review and prepare comments on NEPA analyses?**

We frequently rely on Forest Service, BLM, and other agency scientific reports for our comments on NEPA projects. Because many of our members have scientific expertise, we sometimes rely on them to bring to our attention data and studies that may be useful to us in preparing comments. Finally, we are familiar with a variety of Internet websites and listserves that provide background information relevant to particular subjects.

- 2. What are the barriers or challenges faced in using information technologies in the NEPA process? What factors should be considered in assessing and validating the quality of the information?**

The quality of scientific information in Forest Service and BLM (the two agencies with which we are most familiar) proposals for activities on public lands is consistently either nonexistent or of very poor quality. Therefore, we face the challenge of analyzing a project without the benefit of adequate scientific analysis provided by the agency that seeks to affect the environment. This situation means that we are forced to expend our minimal resources to attempt to gather the requisite information. In demonstrating the viability of federal projects, this role should be filled by the federal government, not grassroots organizations such as ours.

When federal agencies assess and validate information for their use in preparing proposals for federal land management, they should be held to the same scientific standards to which scientists in non-federal roles must adhere. This standard was described in *Daubert v. Merrell Dow Pharmaceutical*, 509 U.S. 579 (1993). In sum, the Supreme Court held in *Daubert* that in order to be admissible in court, scientific information: 1) must be useful to the court in understanding the testimony and the facts of the case; 2) must indicate whether the information at issue has been tested in the field; 3) whether the theory had been subject to peer review; 4) the rate of error of the theory; 5) the existence of standards controlling the theory's operation; and 5) general acceptance of the theory still played a role in the acceptability of the information. Scientific theories or information that have been field-tested and peer reviewed are given more weight than non-field tested and non-peer reviewed data.

Frequently the USFS and BLM rely on theories and models for their conclusions, but do not provide the background information related to this data. Because the federal agencies carry *Chevron* deference in court in terms of this data, the public is prevented from ever analyzing whether or not the models, theories, and information are sound scientific practices, and are prevented from offering scientific information of their own for agency consideration.

All scientific information should be on an equal footing. Application of the *Daubert* principles would level the playing field, and allow all applicable information to be available for public and agency inspection and interpretation.

- 3. Do you maintain databases and other sources of environmental information for environmental analyses? Are these information sources standing or project specific?**

Yes, we maintain such databases. They are both project specific and standing. We have no advice to offer regarding development and maintenance of similar federal systems.

4. **What information management and retrieval tools do you use to access, query, and manipulate data when preparing analyses or reviewing analyses? What are the key functions and characteristics of these systems?**

We use GIS information as well as word-processing databases when reviewing NEPA documentation. Because our analysis is nearly always of timber sales, accessing this information is relatively standardized.

5. **What are your preferred methods of conveying or receiving information about proposed actions and NEPA analyses and for receiving NEPA documents (e.g., paper, CD-ROM, web-site, public meeting, radio, television)? Explain the basis for your preferences.**

In general, we prefer to receive Schedules of Proposed Actions (SOPAs) by mail. We prefer to obtain copies of NEPA documents (EAs, EISs) by electronic medium: usually by going to agency websites and downloading the information.

Having the option of downloading information from the Internet reduces the amount of paper we receive, since we may decide not to comment on a particular project. Electronic formats also allow us to search the document quickly for pertinent information (using the "find" feature) rather than flipping through lengthy paper copies. Moreover, posting NEPA documents on-line allow us to download color maps, which are usually black and white copies when released to the public in paper form: black and white maps of vegetation GIS layers, for example, are completely useless.

We strongly recommend that the agencies begin posting EAs, EIS's, DN/FONSI's, and associated analysis files on-line. Some national forests have done this, and we find it extremely helpful. We would also recommend that the agencies use a standardized format for posting NEPA documents, either in Word, WordPerfect, or Adobe formats that are searchable.

6. **What information management technologies have been particularly effective in communicating with stakeholders about environmental issues and incorporating environmental values into agency planning and decision making (e.g., web sites to gather public input or inform the public about a proposed action or technological tools to manage public comments)? What objections or concerns have been raised concerning the use of tools (e.g., concerns about broad public access)?**

Please refer to response 5, above. We believe that Internet access to NEPA documentation is extremely useful, so long as paper copies are still available to members of the public that do not have Internet access.

7. What factors should be considered in balancing public involvement and information security?

Information can be posted electronically without infringing upon document integrity (i.e., alteration) through the use of appropriate word-processing software. For example, Adobe offers the option of protecting documents from editing by third parties, and yet allows the document to be searched.

B. Federal and Inter-Governmental Collaboration.

We have no particular role in, or comments to give, on this issue.

C. Programmatic Analysis and Tiering.

In general, we support the *appropriate* use of programmatic analysis and tiering. However, it is our experience that the Forest Service, BLM, National Marine Fisheries Service, and Fish and Wildlife Service are unable to utilize programmatic documentation and tiering in such a legal manner. Therefore, we caution against its use, unless the appropriate analysis has taken place at all levels, as described below.

1. What types of issues best lend themselves to programmatic review, and how can they best be addressed in a programmatic analysis to avoid duplication in subsequent tiered analysis?

We are well aware of the Bush Administration's complaint regarding "analysis paralysis," a phrase that is usually used to refer to the many levels of environmental review. However, we have no examples of where programmatic analysis has been used in an appropriate manner. For example, consultation on listed species occurred to some degree in the biological opinion for the Northwest Forest Plan, but that opinion specifically reserved for later consultations the determination of whether species such as the northern spotted owl would be jeopardized by site-specific timber harvest. In Oregon, Fish and Wildlife Service (FWS) fulfills its Endangered Species Act Section 7 obligation by consulting on a programmatic basis with USFS and BLM for federal timber sales within geographic provinces established by the Northwest Forest Plan (e.g., Willamette Province). These provincial programmatic consultation documents merely state that they "tier" to the NFP biological opinion for their effects analysis. In turn, site-specific timber sale analysis NEPA documents simply refer to the programmatic biological opinions for the impacts to species. The result is that the impacts of logging to listed species are never adequately discussed, in violation of both NEPA and the Endangered Species Act. This situation is illegal, and is currently under review by the Ninth Circuit Court of Appeals.

Perhaps one way to reduce the amount of consultation and duplicative NEPA analysis would be to revamp the Forest Service's and BLM's timber sale program, to focus on true watershed restoration rather than mature and old growth logging. We would propose that the agencies prepare watershed-wide restoration proposals that focus on thinning young managed stands, fire-prone areas of dense forest, correcting fish passage issues, riparian planting, and instream habitat creation (to name a few aspects of restoration). This environmental impact statement could include all of the projects that the agency wanted to implement in that watershed for a period of 5 to 10 years, and would require a single consultation with the appropriate agencies. Provided that this EIS was legally adequate, considered public input, and proposed true restoration rather than "forest health" logging (which focuses on old growth logging and roading), it would reduce the amount of controversy inherent in the projects that

the Forest Service and BLM are currently offering (i.e., commercial timber sales targeting mature and old growth forests).

2. *Please provide examples of how programmatic analyses have been used to develop, maintain and strengthen environmental management systems, and examples of how an existing environmental management system can facilitate and strengthen NEPA analyses.*

Please see previous response.

D. Adaptive Management/Monitoring and Evaluation Plans.

1. *What factors are considered when deciding to use an adaptive management approach?*

In our experience, the Forest Service and BLM have not used adaptive management in altering the nature of land management decisions.

2. *How can environmental impact analyses be structured to consider adaptive management?*

The adaptive management provisions in the Northwest Forest Plan (e.g., implementation monitoring, effectiveness monitoring, etc.) establish a reasonable framework for implementing adaptive management in subsequent management decisions. Unfortunately, in our experience, the Forest Service and BLM have ignored this framework, and have not used adaptive management in altering the nature of land management decisions.

3. *What aspects of adaptive management may, or may not, require subsequent NEPA analyses?*

The way in which the Northwest Forest Plan anticipates adaptive management working is that after each project is implemented, the agency will review the project and its effects, and then alter (i.e., design) subsequent similar projects accordingly. NEPA is required for the subsequent projects.

4. *What factors should be considered (e.g., cost, timing, staffing needs, environmental risks) when determining what monitoring techniques and levels of monitoring intensity are appropriate during the implementation of an adaptive management regime? How does this differ from current monitoring activities?*

The Northwest Forest Plan clearly establishes the types of adaptive management monitoring that should occur as agency understanding of project effects changes over time. We point CEQ to the Plan's Record of Decision and Standards and Guidelines for a complete discussion on adaptive management monitoring.

E. Categorical Exclusions.

1. *What information, data studies, etc., should be required as the basis for establishing a categorical exclusion?*

Similar to the information required for an EA or EIS, the agencies should have substantial scientific information available that supports its conclusion that a categorical exclusion is appropriate for the type of activity proposed. In our experience, CEs have been used to segment otherwise large and environmentally degrading projects such as the Back Country Discovery Route in California, Oregon, and Washington. A project of this nature – a multi-state off-road vehicle route – should not have been considered with a categorical exclusion, a mechanism that is reserved by law for minor projects that have very limited (if any) effects on the environment.

Therefore, we strongly recommend that the decision to use CEs be supported by the same scientific evidence as the decision to prepare an EA or EIS.

2. *What points of comparison could an agency use when reviewing another agency's use of a similar categorical exclusion in order to establish a new categorical exclusion?*

We have no opinion on this question.

3. *Are improvements needed in the process that agencies use to establish a new categorical exclusion? If so, please describe them.*

We would encourage the agencies to use a transparent process in determining whether a CE is an appropriate venue for projects that affect the environment.

F. *Additional Areas for Consideration.*


We have a few additional comments that we would like to provide to the Task Force. First, as stated previously, we strongly encourage the agencies to post NEPA documents on line for ease of access.

Second, we believe that the framework provided by NEPA is a workable framework, and that the law does not need to be changed. Instead, the Forest Service and BLM should focus on projects that do not draw the type of controversy that result in long delays in implementation or cancellation of projects. Our organizations do not appeal or litigate projects that restore the environment, thin overstocked plantations, remove roads, create in-stream habitat, and other similar activities.

Finally, we are concerned that any changes to NEPA – this country's premier public involvement statute – will have adverse repercussions that will further delay the implementation of environmentally beneficial projects. As the Clinton Administration learned when it exempted logging projects from environmental review in 1995, cutting the public out of land management decisions is poor political and social policy, and only leads to more gridlock. We hope that this Administration will not make similar mistakes.

In closing, we appreciate the opportunity to comment on the NEPA Task Force's scope, and to provide feedback on the NEPA process. If you have any questions about these comments, please do not hesitate to contact us.

Sincerely,


Susan Jane M. Brown, Executive Director, Esq.
Gifford Pinchot Task Force